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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 302

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, ET AL. ETC.,

Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. FITZGIBBON AND HENRY C. RULE, ETC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

MOTION TO DISMISS OR AFFIRM AND STATEMENT OPPOSING JURISDICTION

THOMAS E. FAIRCHILD,
Attorney General of Wisconsin,
STEWART G. HONECK,
Deputy Attorney General,
BEATRICE LAMPERT,
Assistant Attorney General,
Counsel for Appellees, Wisconsin Employment Relations Board, L. E. Gooding, J. E. Fitzgibbon, and Henry C. Rule, and Thomas E. Fairchild.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action 4844

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, GORDON DONNELLY, EMIL HEIMSCH, THOMAS LANSING, JOHN F. SHEEHAN, E. F. REGNER, EDWARD P. REGAN, LA MOINE S. CARDINAL, INDIVIDUALLY AND AS OFFICERS OF LOCAL 18 UNITED GAS COKE AND CHEMICAL WORKERS OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATION, AND LOCAL 18, UNITED GAS COKE AND CHEMICAL WORKERS OF AMERICA, (CIO),

Plaintiffs,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. FITZGIBBON AND HENRY C. RULE, INDIVIDUALLY AND AS COMMISSIONERS CONSTITUTING THE WISCONSIN EMPLOYMENT RELATIONS BOARD, AND THOMAS E. FAIRCHILD, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN, AND THE MILWAUKEE GAS LIGHT COMPANY, A WISCONSIN CORPORATION,

Defendants

ALTERNATIVE MOTION TO DISMISS OR AFFIRM

Now come the appellees, Wisconsin Employment Relations Board, L. E. Gooding, J. E. Fitzgibbon, Henry C.

Rule and Thomas E. Fairchild, and respectfully move the Supreme Court of the United States, in the alternative:

1. To dismiss the appeal in the above entitled cause, for lack of jurisdiction, or if such motion be denied

2. To affirm the judgment of the District Court of the United States for the Eastern District of Wisconsin dismissing the action in the above entitled cause, on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The motion of the appellees is made pursuant to Rule 12, paragraph 3 of the Rules of the Supreme Court of the United States. It is based upon facts set forth in the record transmitted upon appeal and summarized in the statement as to jurisdiction filed herewith on behalf of the above named appellees.

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Attorney General, State of Wisconsin,
STEWART G. HONECK,
Deputy Attorney General,
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Assistant Attorney General,
Attorneys for Appellees, Wisconsin Employment Relations Board, L. E. Gooding, J. E. Fitzgibbon and Henry C. Rule, and Thomas E. Fairchild.

P. O. Address: State Capitol, Madison 2, Wisconsin.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 4844

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, GORDON DONNELLY, EMIL HEIMSCH, THOMAS LANSING, JOHN F. SHEEHAN, E. F. REGNER, EDWARD P. REGAN, LA MOINE S. CARDINAL, INDIVIDUALLY AND AS OFFICERS OF LOCAL 18 UNITED GAS COKE AND CHEMICAL WORKERS OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATION, AND LOCAL 18, UNITED GAS COKE AND CHEMICAL WORKERS OF AMERICA, (CIO),

Plaintiffs,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. FITZGIBBON AND HENRY C. RULE, INDIVIDUALLY AND AS COMMISSIONERS CONSTITUTING THE WISCONSIN EMPLOYMENT RELATIONS BOARD, AND THOMAS E. FAIRCHILD, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN, AND THE MILWAUKEE GAS LIGHT COMPANY, A WISCONSIN CORPORATION,

Defendants

STATEMENT AS TO JURISDICTION BY THE APPELLEES WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. FITZGIBBON, HENRY C. RULE AND THOMAS E. FAIRCHILD.

In compliance with Rule 12, Paragraph 3 of the Rules of the Supreme Court of the United States, the appellees,

Wisconsin Employment Relations Board, L. E. Gooding, J. E. Fitzgibbon, Henry C. Rule and Thomas E. Fairchild submit herewith a statement disclosing matter and ground making against the jurisdiction of the District Court of the United States for the Eastern District of Wisconsin to allow appeal directly to the Supreme Court of the United States; and in support of the motion of the above named appellees to dismiss said appeal or to affirm the judgment of said District Court dismissing the action.

I

Facts on Which the Motion of the Above Appellees is Based, and upon Which Jurisdiction Is Opposed

All of the facts herein set forth are undisputed, and are shown in the findings of the District Court based upon the pleadings and the stipulation of the parties.

The action, commenced by the appellants in the District Court for the Eastern District of Wisconsin, sought judgment restraining the enforcement of Subch. III of Ch. 111 of the statutes of Wisconsin for 1947, on the ground of unconstitutionality. A court of three judges was convened to hear the matter, but it did not consider the validity of the state statutes. The District Court did not either grant or deny the injunction sought, but instead dismissed the action on the sole ground that the issues were *res adjudicata.*

In September, 1948, the appellant Local 18 and its president, Thomas Lansing (both appellants in the above entitled cause), brought an action in Circuit Court for Milwaukee County in their own behalf and on behalf of all employees of the Milwaukee Gas Light Company, against the Wisconsin Employment Relations Board and the Milwaukee Gas Light Company (both appellees in the above entitled cause) praying the court to declare Subch. III of Ch. 111

of the Statutes of Wisconsin for 1947 unconstitutional, and to give such further relief by way of declaration of the rights of the parties as might be lawful, just and proper. As a result of such action the Circuit Court of Milwaukee County entered the following judgment on January 6, 1949:

> "It Is Hereby Adjudged and determined that Chapter 414, Laws of 1947, being Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947, is a valid and constitutional act, and does not violate nor conflict with any of the provisions of the Constitution of the State of Wisconsin, nor with any of the provisions of the Constitution of the United States, nor with any amendment thereto, and does not conflict with the United States Labor-Management Relations Act of 1947, and does not deny to the plaintiffs, nor to any of the employees of the defendant Milwaukee Gas Light Company represented by them, and does not deprive them of, any rights, privileges or protection secured to them under either of said constitutions or said act of Congress; and that the plaintiffs, the defendant Milwaukee Gas Light Company, and its employees represented by the plaintiffs herein, are subject to and controlled by said Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947.
>
> "It Is Further Adjudged that the prayer of the plaintiffs in the above entitled action for further relief be and the same hereby is denied."

Appeal was taken from such judgment to the Supreme Court of Wisconsin, which affirmed the judgment on July 12, 1949, without modification. No review of the action of the state court by the United States Supreme Court was sought.

II

The Judgment of the Wisconsin Court Was Res Adjudicata With Respect to the Issues Sought to Be Raised in This Proceeding.

The doctrine of *res adjudicata* is briefly summarized in *Grubb* v. *Public Utilities Comm.*, (1930) 281 U. S. 470, 479, 50 S. Ct. 374, 74 L. ed. 972:[1]

> "* * * a judgment upon the merits in one suit is *res judicata* in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted but also as respects any other available matter which might have been presented to that end. * * *"

---

[1] By the full faith and credit clause of the Federal Constitution which has been made applicable by Congress to federal courts, by sec. 28 U.S.C. sec. 1738 (1948) and the earlier laws from which it was derived, it has regularly been held by federal courts that the judgment of a state court is *res adjudicata* and bars a subsequent action in federal court.

Angel v. *Bullington*, (1947) 330 U. S. 183, 67 S. Ct. 657, 91 L. ed. 832;
Treinies v. *Sunshine Mining Co.*, (1939) 308 U. S. 66, 60 S. Ct. 44, 84 L. ed. 85, rehearing denied, 309 U. S. 693, 60 S. Ct. 464, 84 L. ed. 1034;
American Surety Co. v. *Baldwin*, (1932) 287 U. S. 156, 53 S. Ct. 98, 77 L. ed. 231;
Grubb v. *Public Utilities Commission of Ohio*, (1930) 281 U. S. 470, 50 S. Ct. 374, 74 L. ed. 972;
Lyon v. *Perin & Gaff Mfg. Co.*, (1888) 125 U. S. 698, 8 S. Ct. 1024, 31 L. ed. 839.

That is true even though federal questions were decided in the state court. *Angel* v. *Bullington*, (1947) 330 U. S. 183, 67 S. Ct. 657, 91 L. ed. 832; *Grubb* v. *Public Utilities Commission*, (1930) 281 U. S. 470, 50 S. Ct. 374, 74 L. ed. 972; *Mitchell* v. *First National Bank of Chicago*, (1901) 180 U. S. 471, 21 S. Ct. 421, 45 L. ed. 627; *Sperry & Hutchinson Co.* v. *City of Tacoma, Wash.*, (D. C. Wash. 1912) 199 F. 853; *Straus* v. *American Publishers Association et al.*, (C.C.A. N.Y. 1912) 201 F. 306, 119 C.C.A. 544, error dismissed (1914) 235 U. S. 716, 35 S. Ct. 197, 59 L ed. 438; *Bank of Kentucky* v. *Stone et al.*, (C.C. Ky. (1898) 88 Fed. 383, affirmed 174 U. S. 799.

The elements necessary to invoke the application of the doctrine of *res adjudicata* are all shown by the record on appeal to be present in this case.

(1) *The subject matter of this action is the same as that involved in the state court judgment, affirmed by the state supreme court, from which no appeal was taken.*

The cause of action in this case, and in the case decided in the state courts, rests wholly upon the asserted invalidity of the substantive provisions of Subch. III of Ch. 111 of the statutes of Wisconsin, 1947, in their application to the appellants. The asserted invalidity in both actions was based on repugnancy to the Constitution and to the Labor Management Relations Act of 1947. If the substantive provisions of the law are valid as applied to these appellants, the basic cause of action fails in either case.

The action before the state court asked that Subch. III of Ch. 111 of the Statutes of Wisconsin for 1947 be declared unconstitutional and invalid and for such further relief by way of declaration of the rights of parties as might be lawful, just and proper. The prayer of the complaint brought before the District Court of the Eastern District of Wisconsin asked that the court issue a judgment declaring "the provisions of Subch. III of Ch. 111 of the Wisconsin Statutes of 1947, insofar as they may be applied to penalize these plaintiffs and others for whom they are authorized to act * * * are void, illegal, unenforcible and repugnant to the United States Labor Management Relations Act of 1947 and to the Constitution of the United States" and for further relief as might be just and equitable.

Both actions were anticipatory to the extent that no application of the law was alleged to have resulted in actual damage, nor was there any allegation in either case that the

law had been so applied by reason of faulty procedure or arbitrary decision as to cause special damage.

The allegations involved in the action commenced before the Eastern District of Wisconsin did not differ in substance from those summarized in the opinion of the Supreme Court of the State of Wisconsin in *United G., C. & C. Workers* v. *Wis. E. R. Board,* (1948) 255 Wis. 145, 156-157; and the relief in either case could have been based on no issue other than the substantive invalidity of the Wisconin Statutes.

Even the remedy sought in the two cases was almost identical, although that would be immaterial on the issue of *res adjudicata.* The rules are summarized in Am. Jur. and C. J. S. as follows:

> " * * * If the causes of action are substantially the same, a difference in the relief sought will not prevent the judgment in the state court from operating as an estoppel in the federal court. * * * " (50 C. J. S. 521)

> " * * * On the other hand, the fact that a different form or measure of relief is asked does not preclude the application of the judgment to estop the maintenance of the second action." (30 Am. Jur. 919)

(2) The judgment of the state court was final

The Supreme Court of the State of Wisconsin, which is the court of last resort in the state, affirmed without modification the judgment hereinbefore quoted. The affirmation by the Supreme Court had the effect under Wisconsin law of making the judgment of the Circuit Court the judgment of the Supreme Court. See *Ean* v. *The Chicago, Milwaukee & St. Paul R. Co.,* (1898) 101 Wis. 166, 170-171, 76 N. W. 329 in which it was stated that the judgment entered by the trial court is upon affirmation "in legal effect, the judgment of this court." The effect of the Supreme Court affirmance was there stated to render the judgment *res adjudicata* as

to all matters upon which the trial court passed as well as on those discussed by the Supreme Court. The court said:

> "• • • It may be stated as elementary that the judgment is conclusive upon every matter upon which the court did actually pass, or upon which it might have passed, in making its decision. The objection to the complaint was that it did not state a cause of action. That covered every ground that could be urged against it, and the decision thereon is conclusive, although the court below may have considered one ground and this court another."

The foregoing summarizes the law of the state, which the appellants must have been presumed to know when they had resort to state courts.

The appellants took no appeal from the judgment, although there can be no question that the judgment was appealable under the rule of *Railway Mail Assn.* v. *Corsi,* (1944) 326 U. S. 88, 65 S. Ct. 1483, 89 L. Ed. 2072.

(3) The Adjudication of the Wisconsin Supreme Court was on the merits.

The summation of the doctrine of *res adjudicata* set out in the *Grubb case, supra,* indicated that a judgment in order to be *res adjudicata* must be one on the merits. In affirming the judgment of the Milwaukee County Circuit Court the Wisconsin Supreme Court necessarily passed not only upon the merits of all the issues expressly discussed by it as well as those presented to the Circuit Court and covered by its judgment. This is inescapable even though it is true that the opinion filed in the supreme court of Wisconsin did not discuss the grounds upon which the appellants claimed the statute was invalid. As pointed out in the case of *Ean* v. *The Chicago, Milwaukee & St. Paul R. Co., supra,* the judg-

ment of the Circuit Court became that of the Supreme Court upon affirmation.

The judgment was no less one upon the merits because it was entered upon general demurrer than it would have been if it had been entered after trial. The only difference between a judgment upon demurrer and one after trial is that upon demurrer the facts pleaded are admitted instead of proven. In arriving at its judgment, the court considers all the facts pleaded by the plaintiff and could have no other facts before it had the issues gone to trial.

It is possible that a demurrer on limited grounds such as defect of parties might not give rise to the defense of *res adjudicata;* but a general demurrer on the basis of the objection that the complaint does not state a cause of action admits all factual allegations and raises all the issues that could be raised in a trial. That is the law of Wisconsin as was laid down in the case of *Ean* v. *The Chicago, Milwaukee & St. Paul R. Co., supra,* above quoted, in which the judgment pleaded as *res adjudicata* was entered upon a demurrer *ore tenus.*

It is well established by decisions of the United States Supreme Court that a judgment sustaining a demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action *is an adjudication upon the merits* and may be pleaded in bar of another suit on the same facts. The judgment is conclusive not only of the matters actually adjudicated but also of any others which could have been determined at that time.

In *Northern Pacific Railway* v. *Slaght,* (1907) 205 U. S. 122, 130, 27 S. Ct. 442, 51 L. Ed. 738, the court said:

> " * * * It is well established that a judgment on demurrer is as conclusive as one rendered upon proof.

Gould v. *Evansville & Crawfordsville R. R. Co.*, 91 U. S. 526; *Bissel* v. *Spring Valley Township*, 124 U. S. 228; Freeman on Judgments, section 267. • • •"

See, also:

Bissell v. *Spring Valley Township*, (1888) 124 U. S. 225, 8 S. Ct. 495, 31 L. Ed. 411;

Gould v. *Evansville and Crawfordsville R. R. Co.*, (1875) 91 U. S. 526, 23 L. Ed. 416;

Aurora City v. *West*, (1868) 74 U. S. 82, 7 Wall. 82, 19 L. Ed. 42;

Ellis v. *The Northern Pacific R. Co.*, (1891) 80 Wis. 459, 50 N. W. 397;

Lewko v. *Chas. A. Krause Milling Co.* (1935), 219 Wis. 6, 261 N. W. 672.

(4) The parties here were parties or privies in the action in the Wisconsin courts

Local 18 of the United Gas, Coke and Chemical Workers of America and Thomas Lansing (appellants here) were parties plaintiff in the action before the Wisconsin court, and the Milwaukee Gas Light Company and Wisconsin Employment Relations Board (appellees here) were parties defendant. The other individual parties plaintiff named in the instant action are joined as officers of Local 18. Individuals named as parties defendant in the instant action are the members of the Wisconsin Employment Relations Board and the Board's counsel, who are joined in their official capacity. The officers of an association are parties privy to an action by the association, and public officials are parties privy to an action against the body which they represent. The rule of *res adjudicata* covers not only the parties to the action but all those privy to them, and all

those represented by them. See 30 Am. Jur. 962 where it is said:

> "* * * While the general rule is that no person is bound by a judgment except those who are parties or stands in privity with others who are parties, there is an exception to the rule, of equal authority with the rule itself, in the case of persons who are virtually represented by persons on the record as parties. In such case, a judgment in favor of the parties representing the general class is operative under the doctrine of res judicata in favor of all who are thus represented, and a judgment against the parties representing the general class is operative against those represented. This doctrine does not depend upon statutory provisions; it is a rule of common law, founded on convenience and necessity. It is based upon the theory that the persons joined and not joined have a common interest, that the parties joined may be depended upon to bring forward the entire merits of the controversy as a protection to their own interests, and that the persons not joined as parties are sufficiently represented by those who are joined. * * *"

(5) The Wisconsin courts have jurisdiction of both the subject matter and the parties

The rule of *res adjudicata* applies only to judgments entered by courts of competent jurisdiction. No question has been raised with respect to the lack of jurisdiction of the Wisconsin courts to pass initially upon the validity of state statutes.*

The parties to the previous action are all residents of the state of Wisconsin and the defendants were all personally served. The plaintiffs in that action (herein the appellants) voluntarily submitted to the jurisdiction of the state court by electing to pursue their remedy there.

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* 50 C. J. S. 530.

All the elements of *res adjudicata* were called to the attention of the District Court for the Eastern District of Wisconsin; and so it followed the only course open to it by dismissing the action as *res adjudicata*, under the general rule stated as follows in 30 Am. Jur. 943:

> "• • • Where the prior judgment is properly brought to the attention of the court, the question whether the doctrine of *res adjudicata* should be applied is one of law, and not for the discretion of the court."

III

The Motion to Dismiss Should be Granted

The appellants bring this appeal under the the provisions of 28 U. S. C. sec. 125, 1949 (June 25, 1948, Ch. 646, 62 Stat. 926) which provides in part:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order *granting or denying*, after notice of hearing, an interlocutory or permanent injunction. • • •" (Emphasis supplied.)

The District Court in the instant case did not either grant or deny an injunction. It declined jurisdiction to exercise its discretion with respect to an injunction, on the grounds of *res adjudicata*. As pointed out in *Hart Steel Co.* v. *Railroad Supply Co.* (1917), 244 U. S. 294, 299, 37 S. Ct. 506, 61 L.-Ed. 1148, the refusal of a court to entertain a suit on the grounds of *res adjudicata* is not merely a matter of practice or procedure, but is jurisdictional. As the court stated there:

> "This doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and en-

> forced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect. • • •"

As pointed out in *Southern Railway Co. v. Clift*, (1922) 260 U. S. 316, 43 S. Ct. 126, 67 L. ed. 283, the doctrine of *res adjudicata* "supersedes • • • [discretion] and compels judgment." There is raised only the question of authority of the court, to which the issue is brought after having been once adjudicated. The court has no authority to entertain the suit.

In such a case, the action of the District Court is not within the terms of 28 U. S. C. sec. 1253, because it is neither an order granting or denying an injunction, but simply a dismissal of a suit on the grounds that the court had no authority to entertain it.

There is no direct appeal to the United States Supreme Court from a judgment of a District Court, even though entered by three judges, where the judgment was not one which would have required the participation of three judges. *Wilentz v. Sovereign Camp WOW*, (1939) 306 U. S. 573, 59 S. Ct. 709, 83 L. ed. 994. Since the District Court in this case was without authority to hear the application for injunction, the participation of three judges was not required.

As was pointed out in *Baker Driveaway Co.* v. *Hamilton*, (D. C. Pa. 1939) 29 F. Supp. 693, parties who fail to appeal from a judgment of a state supreme court but thereafter proceed in a federal district court, are in effect endeavoring to appeal from the state supreme court to the federal district court. The court said:

> "The present action is equivalent to an appeal from the supreme court of Pennsylvania to this court. The district courts of the United States are not vested with

> appellate jurisdiction over the supreme court of Pennsylvania, and consequently this court cannot review or modify the judgment of the supreme court of Pennsylvania in the present case, that court having had jurisdiction over the parties and the subject matter."

The action for injunction was there dismissed in the same manner as the action in the case now before the court was dismissed by the District Court for the Eastern District of Wisconsin. The dismissal in both cases was, in substance, based on the lack of jurisdiction or power of the court to entertain the action. Under such circumstances no appeal lies directly to the Supreme Court of the United States, because there was no exercise of discretion with respect to the application for injunction.

IV

If the Motion to Dismiss Be Denied, the Motion to Affirm Should Be Granted

It was held by this Court in *Arrowsmith* v. *Harmoning*, 118 U. S. 194, 6 S. Ct. 1023, 30 L. ed. 243, that where a motion to affirm is united with a motion to dismiss, the motion to affirm may be granted even though the motion to dismiss is denied. The arguments in support of the motion to dismiss, if they lend color for such a motion, carry even greater weight with respect to a motion to affirm. In the case of *Grubb* v. *Public Utilities Commission of Ohio* (1929), 281 U. S. 470, 50 S. Ct. 374, 74 L. Ed. 972, a motion to dismiss or affirm on the grounds of *res adjudicata* was submitted, and the motion to affirm was granted. The situation there was very similar to the case now at bar. With respect to the action in the state court, which was adjudged to be *res adjudicata*, the court said:

> "The case in the state court was so far identical with the suit in the federal court as respects subject

matter and parties that there can be no doubt that the judgment in the former, unless invalidated by some jurisdictional infirmity, operated to bar the further prosecution of the latter. That the state court had jurisdiction of the parties is plain and not questioned. But the appellant does question that it had jurisdiction of the subject matter—and this although at the outset he treated that jurisdiction as subsisting and invoked its exercise. * * *

"The appellant relies on the commerce clause of the Constitution as in some way operating to commit to the federal courts and to withhold from the state courts jurisdiction of all suits relating to the regulation or attempted regulation of interstate commerce. This view of that clause is quite inadmissible. It has no support in any quarter, is at variance with the actual practice in this class of litigation * * *."

In granting the motion to affirm the court said with respect to the doctrine of *res adjudicata:*

"The thing presented for adjudication in the case in the state court was the validity of the order, and it was incumbent on the appellant to present in support of his asserted right of attack every available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that. *Werlein* v. *New Orleans*, 177 U. S. 390, 398, *et seq.*; *United States* v. *California and Oregon Land Co.*, 192 U. S. 355, 358.

"As the ground just described was available but not put forward the appellant must abide by the rule that a judgment upon the merits in one suit is *res judicata* in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end. *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 319; *United States* v. *Moser*, 266 U. S. 236, 241; *Cromwell* v. *County of Sac*, 94 U. S. 351, 352.

"We think it follows from what has been said that the objections taken to the decree below are so unsubstantial that the motion to affirm without awaiting oral argument should be sustained."

Respectfully submitted,

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